Public Prosecutor v Mohd Zahari bin Embong

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS J-05–189 OF 2010 AND J-05–265 OF 2010
ABDUL MALIK ISHAK, APANDI ALI AND BALIA YUSOF JJCA
6 JUNE 2012

Evidence — Statements — Admissibility — Accused charged with murder of wife and three children — Prosecution's evidence wholly circumstantial — Whether accused's verbal statements to others at scene of incident admissible in evidence — Whether statements contemporaneous with the deaths — Whether prosecution's appeal largely against findings of facts by trial court — Whether appellate court slow to disturb such findings if not against weight of evidence — Evidence Act 1950 s 6

The respondent ('accused') was charged in the High Court with the murders of his 32-year-old wife, his two sons, aged two years and six years, and a daughter who was barely over a year old. There were no eye-witnesses to the killings and the prosecution's evidence was wholly circumstantial. Two witnesses for the prosecution, SP7 and SP12, who were the accused's immediate neighbours, testified that on the night in question they saw the accused outside his house crying, looking angry and shouting uncontrollably. SP7 said the accused told her his wife had beaten the children to death and he could not control himself. When SP7, and later SP12, went into the accused's house to check they saw four bodies lying in the living room. Police later arrived and arrested the accused and recovered the murder weapon, a hollow iron rod ('P61') which was part of the youngest child's cradle and which had her mother's fingerprints on it. The youngest child died of head and abdominal injuries while the accused's wife and the other two children died of head and neck injuries, all due to blunt force trauma. The police investigations officer, SP15, told the court his interrogation of the accused revealed the accused had assaulted his wife with P61 in a fit of rage on finding she had hit her children with it after the two boys, while fighting amongst themselves, had caused the cradle to collapse. At the end of the prosecution's case, the accused was called to make his defence only to the charge of killing his wife. He was acquitted of the other charges. After hearing the defence's case the court ruled the accused had acted under grave and sudden provocation and amended the murder charge to culpable homicide to which the accused pleaded guilty. He was sentenced to 12 years jail. In coming to its decision on all the charges the High Court held that: (i) the accused had no reason to kill his children whom witnesses testified he loved dearly (ii) no witnesses saw the accused beating his children (iii) the accused's verbal statements immediately after the incident were relevant and admissible as evidence and were consistent with his subsequent statements to police (iii) the accused's story that his wife had assaulted the two boys with P61 for causing

their sister to fall from the cradle was reasonable as P61 contained the wife's fingerprints and (iv) the prosecution's expert witness, a pathologist, was unable to say which of the victims died first thus rendering probable the accused's story that he assaulted his wife after she had beaten the children. The prosecution filed two appeals – one against the acquittal and another against the reduction in the murder charge – to the Court of Appeal contending that the trial judge (i) gave undue weight to the exculpatory statement of the accused (exh D75) (ii) was wrong to admit in evidence what the accused had told SP7, SP12 and his sister, SP11, as the statements were not contemporaneous to the event (iii) gave undue weight to the presence of the dead wife's fingerprints on P61 to conclude she killed the children and (iv) failed to consider there was sufficient circumstantial evidence to call for the accused's defence on the charges of murdering the children. Although the prosecution only proceeded with its appeal against the acquittal decision, the appellate court considered both the appeals in coming to its decision.

Held, dismissing the appeals and affirming the decisions of the High Court:

(1) The words or statements uttered by the accused to SP7, SP11 and SP12 were contemporaneous with the event relating to the deaths of the four deceased persons and therefore was admissible in evidence under s 6 of the Evidence Act 1950. There was ample evidence to show the statements were made 'so shortly before or after' the tragic incident (see para 23).

(2) The defence's story was adduced through the cross-examination of the prosecution's witnesses including the investigations officer, SP15 who agreed with a suggestion by defence counsel that there was no evidence to show the injuries on the three children were caused by the accused (see para 24).

(3) The prosecution's contentions in the appeal were primarily factual. An appellate court would be slow to disturb findings of fact if they were not clearly against the weight of the evidence. The trial judge had correctly applied his mind to the evidence in a proper and judicial manner. There was no error in his approach and appreciation of the evidence and no reason for the appeal court to interfere with his findings and conclusions at all stages of the trial (see para 25).

[Bahasa Malaysia summary

Responden ('tertuduh') telah dituduh di Mahkamah Tinggi dengan pembunuhan isterinya yang berumur 32 tahun, dua orang anak lelakinya, berumur dua tahun dan enam tahun, dan seorang anak perempuan yang baru sahaja berumur satu tahun lebih. Tiada saksi menyaksikan pembunuhan tersebut dan keterangan pendakwaan adalah secara keseluruhannya mengikut keadaan. Dua saksi untuk pendakwaan, SP7 dan SP12, yang merupakan jiran-jiran terdekat tertuduh, memberi keterangan bahawa pada malam

tersebut mereka melihat tertuduh berada di luar rumahnya menangis, kelihatan marah dan menjerit tanpa kawalan. SP7 mengatakan tertuduh memberitahunya bahawa isterinya telah memukul anak-anaknya sehingga mati dan dia tidak dapat mengawal dirinya. Apabila SP7, dan kemudiannya SP12, masuk ke dalam rumah tertuduh untuk memeriksa, mereka melihat empat mayat terbaring di ruang tamu. Polis kemudiannya tiba dan menahan tertuduh dan menemui senjata pembunuhan, sebatang besi berongga ('P61') yang merupakan sebahagian daripada buaian anak paling muda dan mempunyai cap jari ibunya di atasnya. Anak paling muda mati disebabkan kecederaan di kepala dan badan manakala isteri tertuduh dan dua orang anak yang lain mati disebabkan kecederaan di kepala dan leher, kesemuanya disebabkan 'blunt force trauma'. Pegawai polis penyiasat, SP15, memberitahu mahkamah soal siasat tertuduh mendedahkan tertuduh menyerang isterinya dengan P61 dalam keadaan marah apabila mendapati isterinya telah memukul anaknya dengan batang besi berongga tersebut selepas dua anak lelakinya, yang bergaduh sesame sendiri, menyebabkan buaian tersebut runtuh. Pada akhir kes pendakwaan, tertuduh dipanggil untuk membuat pembelaannya hanya untuk pertuduhan membunuh isterinya. Dia dibebaskan daripad pertuduhan lain. Selepas pendengaran kes pembelaan, Mahkamah memutuskan tertuduh telah bertindak di bawah bangkitan marah besar dan mengejut dan meminda pertuduhan bunuh kepada homisid salah di mana tertuduh mengaku bersalah. Dia dijatuhkan hukuman 12 tahun penjara. Semasa membuat keputusan ke atas kesemua pertuduhan Mahkamah Tinggi memutuskan bahawa: (i) tertuduh tidak mempunyai niat untuk membunuh anak-anaknya di mana saksi-saksi telah memberi keterangan yang dia amat menyayangi mereka (ii) tiada saksi-saksi yang menyaksikan tertuduh memukul anak-anaknya (iii) kenyataan lisan tertuduh sejurus selepas kejadian adalah relevan dan diterima sebagai keterangan dan konsisten dengan kenyataan selepas itu kepada polis (iii) cerita tertuduh bahawa isterinya menyerang dua anak lelakinya dengan P61 kerana menyebabkan adik perempuan mereka jatuh daripada buaian adalah munasabah memandangkan P61 mengandungi cap jari si isteri dan (iv) saksi pakar pendakwaan, seorang ahli patologi, tidak dapat mengatakan yang mana satu mangsa mati dahulu oleh itu menjadikan cerita tertuduh berkebarangkalian bahawa dia menyerang isterinya selepas isterinya memukul anak-anak. Pendakwaan memfailkan dua rayuan — satu terhadap pembebasan dan satu lagi terhadap pengurangan dalam pertuduhan bunuh — kepada Mahkamah Rayuan dengan menghujah bahawa hakim perbicaraan (i) memberikan beban tidak wajah kepada penyataan membersihkan nama tertuduh (eksh D75) (ii) terkhilaf untuk menerima sebagai keterangan apa yang tertuduh beritahu kepada SP7, SP12 dan kakaknya, SP11, memandangkan penyataan-penyataan tersebut tidak berlaku secara serentak dengan kejadian tersebut (iii) memberikan beban tidak wajar kepada kehadiran cap jari isteri yang mati pada P61 untuk menyimpulkan si isteri yang membunuh anak-anak dan (iv) gagal untuk mempertimbangkan keterangan mengikut keadaan yang mencukupi untuk memanggil pembelaan tertuduh

atas pertuduhan membunuh anak-anak. Walaupun pendakwaan hanya meneruskan rayuannya terhadap keputusan pembebasan, Mahkamah Rayuan mempertimbangkan kedua-dua rayuan semasa membuat keputusan.

Diputuskan, menolak rayuan dan mengesahkan keputusan-keputusan Mahkamah Tinggi:

(1) Perkataan atau penyataan yang diutarakan oleh tertuduh kepada SP7, SP11 dan SP12 adalah serentak dengan kejadian berhubung kematian keempat-empat si mati dan oleh itu boleh diterima sebagai keterangan di bawah s 6 Akta Keterangan 1950. Terdapat keterangan mencukupi menunjukkan penyataan-penyataan dibuat 'sejurus sebelum atau selepas' insiden tragik tersebut (lihat perenggan 23).

(2) Cerita pembelaan dikemukakan menerusi pemeriksaan balas saksi-saksi pendakwaan termasuk pegawai penyiasat, SP15, yang bersetuju dengan cadangan peguam bela bahawa tiada keterangan menunjukkan kecederaan ke atas ketiga-tiga anak disebabkan oleh tertuduh (lihat perenggan 24).

(3) Hujahan pendakwaan dalam rayuan mengutamakan fakta. Mahkamah Rayuan akan berhati-hati untuk mengganggu dapatan fakta sekira ia tidak secara nyata menentang beban keterangan. Hakim perbicaraan dengan tepat telah menggunakan pemikirannya kepada keterangan dengan cara yang bersesuaian dan mengikut kehakiman. Tiada kekhilafan dalam cara beliau dan penghargaan keterangan dan tiada sebab untuk mahkamah rayuan mengganggu dengan dapatan beliau dan kesimpulan-kesimpulan pada semua peringkat perbicaraan (lihat perenggan 25).]

Notes

For cases on admissability, see 7(2) *Mallal's Digest* (4th Ed, 2011) paras 2719–2733.

Cases referred to

Andy bin Bagindah v Public Prosecutor [2000] 3 MLJ 644; [2000] 3 CLJ 289, CA (refd)

Chan Chwen Kong v PP [1962] 1 MLJ 307, CA (refd)

Chan Kwee Fong v PP [2010] 1 MLJ 441, CA (refd)

Chian Swee Ong v PP [2010] 1 MLJ 16; [2010] 3 CLJ 799, CA (refd)

Tan Buck Tee v PP [1961] MLJ 176, CA (refd)

Tan Hung Yeoh v Public Prosecutor (1999) 3 SLR 93, HC (refd)

Teper v Reginam [1952] 2 All ER 447, PC (refd)

Wan Marzuki bin Wan Abdullah v Public Prosecutor [2008] MLJU 285; [2008] 4 CLJ 631, CA (refd)

Legislation referred to
Evidence Act 1950 s 6
Penal Code ss 302, 304(a)

Appeal from: Criminal Trial No MT(4)–45–30 of 2006 (High Court, Johor Bahru)

Nurul Huda Nuraini (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
G Subramaniam Nair (Maniam Nair & Co) for the respondent.

Apandi Ali JCA:

INTRODUCTION

[1] The accused person faced four charges for the murder of his wife and his three children. The four charges are as follows:

(1) 1st Charge:

Bahawa kamu pada 11 Mac 2006 di antara jam 7.00 malam hingga 8.40 malam, di rumah No. 80, Jalan Pulasan 29, Taman Kota Masai, di dalam daerah Johor Bahru, di dalam negeri Johor Darul Ta'zim, telah melakukan kesalahan membunuh dengan menyebabkan kematian seorang perempuan bernama MARDZIAH BINTI MANSOR, NO. K/P: 730904-09-5052, Umur: 32 tahun 6 bulan dan oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

(2) 2nd Charge:

Bahawa kamu pada 11 Mac 2006 di antara jam 7.00 malam hingga 8.40 malam, di rumah No. 80, Jalan Pulasan 29, Taman Kota Masai, di dalam daerah Johor Bahru, di dalam negeri Johor Darul Ta'zim, telah melakukan kesalahan membunuh dengan menyebabkan kematian seorang kanak-kanak lelaki bernama MUHAMMAD ZAMRIE BIN MOHD ZAHARI, No. Sijil Kelahiran: 991104-01-6083, Umur: 6 tahun 4 bulan dan oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

(3) 3rd Charge:

Bahawa kamu pada 11 Mac 2006 di antara jam 7.00 malam hingga 8.40 malam, di rumah No. 80, Jalart Pulasan 29, Taman Kota Masai, di dalam daerah Johor Bahru, di dalam negeri Johor Darul Ta'zim, telah melakukan kesalahan membunuh dengan menyebabkan kematian seorang kanak-kanak lelaki bernama MUHAMMAD ZAIRIE BIN

MOHD ZAHARI, No. Sijil Kelahiran: 030612-01-1331, Umur: 2 tahun 9 bulan dan oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

(4) 4th Charge:

Bahawa kamu pada 11 Mac 2006 di antara jam 7.00 malam hingga 8.40 malam, di rumah No. 80, Jalan Pulasan 29, Taman Kota Masai, di dalam daerah Johor Bahru, di dalam negeri Johor Darul Ta'zim, telah melakukan kesalahan membunuh dengan menyebabkan kematian seorang kanak-kanak perempuan bernama INTAN ZAHARAH BINTI MOHD ZAHARI, No. Sijil Kelahiran: 050218-01-0478, Umur: 1 tahun 21 hari dan oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

[2] At the trial in the Johor Bahru High Court, the accused was acquitted and discharged in respect of the murder of his three children, at the end of the prosecution's case, without calling for his defence. This is in respect of the second, third and fourth charges. However the accused was directed to enter his defence in respect of the murder of his wife. After hearing the defence, at the end of the trial but before delivering his decision, the learned judicial commissioner amended the original charge under s 302 of the Penal Code to one under s 304(a). The amended charge reads as follows:

Bahawa kamu pada 11 Mac 2006, di antara jam 7.00 malam hingga 8.40 malam di rumah No. 80, Jalan Pulasan 29, Taman Kota Masai, di dalam daerah Johor Bahru, di dalam negeri Johor Darul Ta'zim telah menyebabkan kematian MARDZIAH BINTI MANSOR No. K/P: 730904-09-5052 dengan niat untuk menyebabkan kecederaan tubuh badan yang mungkin menyebabkan kematiannya, dan dengan itu kamu telah melakukan homisid salah yang tidak terjumlah kepada kesalahan membunuh yang boleh dihukum di bawah seksyen 304(a) Kanun Keseksaan.

[3] After a short adjournment, the accused pleaded guilty to the amended charge. The High Court then convicted the accused on the amended charge and sentenced him to 12 years imprisonment with effect from the date of his arrest, namely the date of the incident.

THE APPEALS

[4] Not satisfied with the two decisions of the learned judicial commissioner, the public prosecutor filed two notices of appeal. One against the acquittal in respect of the second, third and fourth charges, and the other is against the reduction of the charge in respect of the first charge. There are on record two appeals, namely Criminal Appeal No J-05–189 of 2010 and J-05–265 of 2010.

On the date of hearing of the appeals, the two cases were called together. However, for reasons best known to the prosecution, learned deputy public prosecutor (DPP) proceeded only in respect of J-05–189 of 2010, ie the appeal against the acquittal of the accused in respect of the murders of his three children. The order of acquittal and discharge, as earlier stated, was without calling for the defence. The course of action taken by the prosecution at the hearing of the appeals can be seen in the DPP's written submissions, which (in paras 2–3) reads as follows:

> [2] At the end of the prosecution case, the respondent was called to enter his defence on the first charge involving deceased wife MARDZIAH BINTI MANSOR. After hearing the respondent's defence the learned trial judge convicted him on an amended charge of section 304(a) of the Penal Code and sentenced him to 12 years imprisonment.
>
> [3] The respondent however was acquitted and discharged without calling for his defence on the second, third and fourth charge involving the deceased children. It is against the acquittal of the respondent of the three charges which the prosecution now appeals to this Honourable Court.

[5] We, nevertheless considered both appeals.

THE FACTS OF THE CASE

[6] This is a tragic story where the accused was charged for the killing of his whole family. Prior to the tragedy the family were living happily as a young couple with three young children aged between six to two years old. On the fateful night (after Maghrib) of 11 March 2006 an immediate neighbour of the accused, Rusilah binti Musa (SP7) saw the accused coming out of the house and crying and was told by the accused that his wife had beaten the children. SP7 went into the house and saw four bodies. In gist SP7's evidence during examination-in-chief are as follows:

> Keadaan Ari masa itu menangis macam orang dalam keadaan geram dan marah. Saya tanya dia 'kenapa buat macam ini'. Dia kata 'cuba Kak Yah bayangkan jika suami Kak Yah pukul anak-anak, Kak Yah marah tak?'. Lepas itu saya kata 'memanglah marah, tapi jika marah pun jangan buat macam tu'. Dia kata dia 'tak tahan sebab isteri pukul anak saya mati'.' … 'Saya tanya dia kenapa dia buat macam ini, saya sangka dia yang buat tetapi dia kata isteri dia yang pukul anak-anak dia. Dia jadi marah dan dia buat 'Mai' kerana dia tak sengaja.'

[7] Another immediate neighbour, Abu Zaar bin Abu Bakar, SP12, who was present at about the sometime gave evidence as follows:

Setiba di rumah saya lihat suasana dalam keadaan huru hara. Saya pun tanya pada jiran-jiran apa yang berlaku dan Puan Rusiah minta saya untuk hubungi polis. Saya tanya apa yang berlaku dan dia suruh saya masuk dalam rumah untuk tengok keadaan. Bila masuk rumah saya lihat 4 tubuh yang kaku. Saya terus tanya Zahari apa yang berlaku dan dia suruh saya pastikan samada anak-anaknya masih hidup atau tidak. Setelah itu saya keluar rumah dan hubungi polis. … Zahari masa itu dalam keadaan orang hilang pertimbangan iaitu dia menangis meraung dan menjerit-jerit.

[8] It was later revealed that the police received the phone call about the tragedy at about 8.40pm. It was received by L/Kpl Zaharin (SP1) from Balai Polis Masai. Upon receiving the first information report, the police immediately commenced investigations, led by ASP Norizam bin Ibrahim, SP15. The police arrived at the house shortly later, and as usual they took photographs of the crime scene, took exhibits relating to the crime and sent the bodies for post-mortem. The accused did not resist and was arrested at the house upon the arrival of the police.

[9] The cause of death of the wife, Mardziah binti Mansor, child Muhammad Zamrie and child, Muhammad Zairie was 'head and neck injuries due to blunt force trauma'. The cause of death of the youngest child, Intan Zaharah was 'head and abdominal injuries due to blunt force trauma'. That's the evidence of the pathologist, Dr Siew Sheue Feng, SP6. The murder weapon recovered from the scene was a hollow iron rod, P61.

[10] There were no eye-witnesses who saw the actual killings. Exh P61 bears finger-prints of the deceased, Mardziah binti Mansor. Prosecution relied on circumstantial evidence, mainly the accused being the last person to be with all the deceased.

THE FINDING AND DECISION BY THE HIGH COURT

[11] The learned judicial commissioner wrote a lengthy 61-page grounds of judgment. He had correctly adopted the approach of giving maximum evaluation of all the evidence adduced by the prosecution, at the end of the prosecution's case (see para 15 of the judgment). He had correctly considered the totality of the evidence adduced.

[12] The learned judicial commissioner, based on evidence adduced, made the following salient findings (see paras 33–34 of the judgment):

33. Selain daripada SP7, SP11, SP12 dan SP15, tidak ada saksi lain yang dapat menunjukkan siapakah yang telah mendatangkan kecederaan kepada empat mangsa tersebut. Daripada kata-kata yang terkeluar daripada mulut tertuduh sendiri, dapat disimpulkan setakat ini bahawa

A kecederaan anak-anak tertuduh telah disebabkan oleh si mati Mardziah binti Mansor dan kecederaan serta kematian si mati Mardziah binti Mansor adalah disebabkan oleh perbuatan tertuduh sendiri seperti diakui oleh beliau. Persoalannya sekarang benarkah kecederaan dan kematian tiga orang anak si mati bukan disebabkan oleh tertuduh? Walaupun punca
B kecederaan tiga anak tertuduh hanya datang daripada mulut tertuduh seorang, namun saya mendapati bahawa keterangan tersebut adalah munasabah dan boleh diterima berdasarkan kepada perkara-perkara yang berikut:

(a) walaupun motif tidak menjadi salah satu intipati pertuduhan bunuh
C namun tiada terdapat motif atau sebab untuk tertuduh membunuh tiga orang anaknya yang menurut saksi-saksi amat disayangi oleh tertuduh;

(b) tiada saksi mata yang melihat tertuduh telah mencederakan tiga orang anaknya;
D

(c) kata-kata yang terkeluar daripada mulut tertuduh sebaik sahaja selepas kejadian boleh diterima sebagai keterangan di bawah s 6 Akta Keterangan 1950 oleh kerana apa yang dicakapkan oleh tertuduh sebaik selepas kejadian adalah fakta yang relevan. Keterangan yang
E sama telah diberikan oleh tertuduh kepada SP15 semasa disoal-siasat dan dalam percakapan tertuduh kepada pihak polis;

(d) ada kemungkinan cerita tertuduh munasabah bahawa Mardziah binti Mansor telah memukul anak-anaknya dengan besi buaian (P61) setelah dua anak lelaki tersebut menjatuhkan anak
F perempuannya dari atas buaian oleh kerana terdapat kesan cap jari Mardziah pada besi buaian tersebut; dan

(e) pihak pendakwaan melalui saksi Doktor Pakar Patologi, Dr Siew Sheue Feng (SP6) gagal memberitahu mahkamah mangsa manakah yang mendapat kecederaan terlebih dahulu dan mangsa mana yang
G telah meninggal dunia terlebih dahulu. Oleh itu ada kemungkinannya cerita tertuduh bahawa tiga anaknya mendapat kecederaan terlebih dahulu sebelum beliau memukul isterinya.

34. Atas alasan-alasan yang tersebut di atas, saya mendapati bahawa pihak pendakwaan telah gagal untuk membuktikan bahawa
H kecederaan-kecederaan yang dialami dan kematian si mati Mohamad Zamrie, Mohamad Zairie dan Intan Zaharah disebabkan oleh perbuatan tertuduh. Sebaliknya, saya berpuashati bahawa kecederaan dan kematian si mati Mardziah binti Mansor adalah disebabkan oleh perbuatan tertuduh.

I

[13] Based on the above findings, at the end of the prosecution's case, the High Court was satisfied that a prima facie case has been proven in respect of the first charge and the accused was accordingly ordered for his defence to be called. In respect of the second, third and fourth charge, the High Court found

that a prima facie case has not been proven and accordingly the accused was acquitted and discharged without calling for his defence.

[14] At the defence stage, the accused gave evidence on oath, and tendered his statement to the police (exh D75) and called one witness, Dr S Jeyarajah, SD2. SD2 is a consultant psyciatrist and a former medical superintendant and director of Hospital Tampoi, Johor Bahru from 1990–1999. He is an expert and gave his evidence in that capacity. SD2 tendered his expert report on the accused (exh D76). The report was in favour of the accused. The expert's evidence was not challenged or rebutted by the prosecution.

[15] Based on the defence story and supported by the expert's evidence, the learned judicial commissioner at the close of the defence case, amended the charge against the accused to one under s 304(a) of the Penal Code. The learned judicial commissioner made a finding of fact that the accused acted under grave and sudden provocation. He was guided in doing so on the case laws of *Chian Swee Ong v Public Prosecutor* [2010] 1 MLJ 16; [2010] 3 CLJ 799 and *Chan Kwee Fong v Public Prosecutor* [2010] 1 MLJ 441. The factual circumstances of this case justify the defence of grave and sudden provocation, thus having the effect of reducing the offence of murder to one of culpable homicide. The accused then pleaded guilty to the amended charge and was accordingly convicted and sentenced to 12 years imprisonment.

THE PROSECUTION'S CONTENTION

[16] On appeal before us, the learned DPP relied mainly on her written submissions and advanced four contentions, which can be summarised as follows:

(a) That the learned judicial commissioner had given undue weight to the exculpatory statement of the accused, that is exhibit D75;

(b) In relation to contention (1) above, the prosecution also submitted that the learned judicial commissioner was in error to admit what the accused had narrated to his neighbours, SP7 and SP12 and also to his sister, SP11. The statements (narration) were admitted under s 6 of the Evidence Act 1950 and on that score the learned DPP argued that the statements should not have been admitted as the statements were not contemporaneous to the event. The prosecution relied on the English case law of *Teper v Reginam* [1952] 2 All ER 447;

(c) That the learned judicial commissioner had given too much weight to the presence of the fingerprints of the deceased wife, Mardziah on the iron rod (exhibit P61) to conclude that it was the deceased wife who killed the three children; and

(d) Lastly, it was argued that there were sufficient circumstantial evidence for the accused to be called for his defence to answer the charges in respect of the death of his three children.

OUR FINDINGS

[17] After hearing the respective submissions and upon perusal of the appeal records and the grounds of judgment, it is our findings that the contentions by the prosecution are primarily factual. An appellate court will be slow to disturb such findings of fact if such findings are not clearly against the weight of evidence. It will not interfere with the findings unless such findings are perverse or obviously wrong. This is trite law, as can be seen from the plethora of case law; of which to quote a few, such as:

(a) *Tan Hung Yeoh v Public Prosecutor* [1999] 3 SLR 93;

(b) *Andy Bagindah v Public Prosecutor* [2000] 3 MLJ 644; [2000] 3 CLJ 289; and

(c) *Wan Marzuki Wan Abdullah v Public Prosecutor* [2008] MLJU 285; [2008] 4 CLJ 631.

[18] The defence story in this case has been adduced during the cross-examinations of the prosecution witnesses, namely SP7, Rusilah binti Musa; SP11, Sarimah binti Embong and SP12, Abu Zaar bin Abu Bakar. It is within the province of criminal law for the defence to tell its story through the prosecution's case (see *Tan Buck Tee v Public Prosecutor* [1961] MLJ 176 and *Chan Chwen Kong v Public Prosecutor* [1962] MLJ 307)

[19] On the issue of the contemporaneousness of the statements by the accused to his neighbours and to his sister, it is our finding that these are ample evidence to show that they were made 'so shortly before or after' the tragic incident on the night of 11 March 2006.

[20] As per the charges, the alleged offences were said to have been committed on 11 March 2006 between 7pm and 8.40pm. It is in evidence that the conversation between SP7, Rusilah binti Musa and the accused took place 'after maghrib' (of which the court can take judicial notice that maghrib prayer time is between 7.30pm to 8.30pm). The conversation between SP12, Abu Zaar bin Abu Bakar and the accused took place immediately before SP12 called the police at about 8.40pm. It is observed that both SP7 and SP12 are the immediate neighbours of the accused. SP7 resided at No 82 Jalan Pulasan 29 and SP12 at No 81 Jalan Pulasan 29 and the accused's house is at No 80 Jalan Pulasan 29. They all lived in a row of double-storey terrace houses along the same road (see photograph exh P11A). There is also the evidence of SP11,

Sarimah, the sister of the accused who testified that she received a call via her house phone on the same date (11 March 2006) after maghrib. This call was confirmed by the investigating officer, ASP Norizam, SP15 that the call to SP11 was made at 8.07pm. This piece of evidence was adduced through the itemised telephone bill, exh P74. In fact SP15 further stated that from his investigations the accused made three calls between 8.07pm to 8.26pm on 11 March 2006 and the calls were to SP11, the sister, SP4, the father-in-law and the last call to the emergency line No 999.

[21] To apply the above facts to the law, it is pertinent to refer to s 6 of the Evidence Act 1950, and illustrations which reads as follows:

> 6. Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction are relevant, whether they occurred at the same time and place or at different times and places.
>
> ILLUSTRATIONS
>
> (a) A is accused of the murder of B by beating him. Whatever was said or done by A or B or the bystanders at the beating or so shortly before or after it as to form part of the transaction is a relevant fact.

[22] In *Teper v Reginam*, it was, inter alia, held that:

> It is essential that the words sought to be proved by hearsay should be, if not absolutely contemporaneous with the action or event, at least so clearly associated with it that they are part of the thing being done, and so an item or part of the real evidence and not merely a reported statement.

[23] It is our judgment that the words or statement uttered by the accused to SP7, SP11 and SP12 were obviously contemporaneous with the event relating to the deaths of the four deceased persons and therefore admissible.

[24] It is further noted that the defence story was also adduced through the cross-examination of the investigations officer, SP15. At the end of the cross-examination SP15 agreed with a suggestion of defence counsel that there was no evidence to show that the injuries on the three children were caused by the accused. To add salt to injury to the prosecution's case, SP15 on re-examination testified as follows:

> Siasatan saya terhadap perangai OKT dengan jiran-jiran dan diberitahu hubungan keluarga itu baik. Ya, hanya kepada percakapan jiran-jiran.
>
> Soal-siasat atas OKT selama 3 - 4 hari oleh anggota saya termasuk oleh saya sendiri. OKT bercerita perkara yang sama.

OKT cerita pada petang itu dia janji dengan anak dan isteri untuk keluar makan dekat KFC. Lepas mandi dia turun bawah dia tengok isteri duduk atas kerusi dan lihat anak-anak dia sudah terbaring. Sudah tak bernyawa atas lantai di ruang tamu. Dia tanya isteri 'apa yang terjadi' dan OKT kata isteri beritahu 2 anak lelaki bergaduh sehingga tolak buaian hingga jatuh. Isteri dia marah ambil besi buaian dan pukul anak-anak. OKT rasa marah dan dia ambil besi buaian itu dan dia pukul isteri dia balik.

CONCLUSION

[25] From the above analysis of the evidence adduced at the trial and upon perusal of the learned judicial commissioner's grounds of judgment, we find that the learned judicial commissioner had correctly applied his mind to the evidence in a proper and judicial manner. We find no error in his approach and appreciation of the evidence and we see no reason or cause for this court to interfere with his findings and conclusions at all stages of the trial.

[26] In that light, we unanimously dismiss the appeals by the prosecution and accordingly affirmed the decisions of the learned judicial commissioner.

Appeals dismissed and decisions of the High Court affirmed.

Reported by Ashok Kumar